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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 613

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, ET AL.,
Petitioners,

vs.

HARRY A. MILLS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF PETITIONERS

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In its brief in opposition to the petition for writ of certiorari, pages 9 and 10, the National Labor Relations Board cites a number of cases holding that a hearing need not be held at any particular time in order to fulfill the requirements of due process. The ruling of these cases, however, is not applicable to the circumstances present here.

These cases with which we have no quarrel relate in most instances to tax statutes. They held constitutional statutes which permit an advisory or preliminary investigation of tax or other liability by an agency of the state, provided that before fixed liability be established, process, notice and full hearing of a judicial character be afforded. Each of these cases involves a statutory scheme permitting a judicial review upon notice and full opportunity to all parties to be heard with respect to the action of some administrative subordinate of the state—a review not available here under Section 9 of the National Labor Relations Act.

In the present case we admittedly have no review if the Board complies with the law, affords notice and grants a fair hearing before ordering an election. In such case we can resort to no appellate tribunal. In order therefore for the Board to receive the protection of judicial immunity afforded by the *Switchmen's Case* it must comply with the requirements of the statute and of due process. The Board certainly cannot claim immunity once it over-steps its statutory agency or departs from its authority. The notice and hearing commanded by Congress must be granted as a prerequisite to validity of the Board's actions. *U. S.* v. *McDaniel*, 7 Peters, 1 to 14, 8 L. ed. 587; *Garfield* v. *U. S.*, 211 U. S. 249; *St. Joseph's Stock Yards* v. *U. S.*, 298 U. S. 38; *FCC* v. *Pottsville*, 84 L. ed. 565; Cf. also *Simons* v. *FCC*, CA, DEC, 65 Fed. 2d 381.

A mere reading of the cases cited by the Board serves to establish that nothing therein contained condones or cures failure to grant an antecedent hearing by affording one *ex post facto*.

Gallup v. *Schmidt*, 183 U. S. 300, upheld the validity of a statute of Indiana as against the claim of unconstitutionality because it did not provide for notice and hearing at the

time of its assessment, where, however, the taxpayer received notice, had ample opportunity to participate in a judicial hearing and did actually appear and contest the amount of the assessment before the amount was finally determined and before the tax liability was established. We of course have no statutory right of appeal or judicial review of the Board's action in ordering an election without granting us notice or hearing.

Wilson v. *Standefer*, 184 U. S. 399, upheld the validity of a state statute granting the state the right to forfeit without notice to a delinquent purchaser of state lands, where by law the purchaser had a six months' period within which to come into court upon an ample opportunity to be heard, in order to contest the forfeiture before judgment thereof became final. We have no such statutory right to a hearing before any judicial tribunal.

York v. *Texas*, 137 U. S. 15, sanctions a Texas statute requiring that a challenge to jurisdiction be presented with other defenses and disposed of upon a hearing of the merits, and reviewable upon one appeal, together with a review of all other issues and merits in the case. Again there is no analogy for we are denied any statutory right of review or appeal.

Wells Fargo v. *Nevada*, 248 U. S. 165, is another case upholding a tax statute where assessment was made without notice and hearing, but where process, issues and trial are provided and judgment entered thereon before tax liability is fixed or established. Again we have no statutory right to a judicial hearing to review the Board's action in refusing to afford us notice or grant us a hearing.

U. S. v. *Illinois Central*, 291 U. S. 457, is a similar case upholding the right of the ICC to issue an order fixing rates without a hearing, but providing that the order has

not legal status of enforceability unless or until, upon complaint, a full hearing is held before such rates are put into effect.

Nickey v. *Miss.*, 292 U. S. 393, is again a decision upholding a tax statute rendering a tax assessable without a notice, but providing that tax liability may not be fixed or established until after formal process issues and with a full opportunity for trial and hearing.

Opp v. *Administrator of Hours and Wages*, 312 U. S. 126, much relied upon by the Board throughout these proceedings, is merely an analogous case holding that an industry committee, empowered under the Act to conduct an investigation and make recommendatory reports to the Administrator, does not violate due process where no notice of hearing is afforded by the Committee since the Act provides for a full hearing upon notice to all parties before the Administrator. There the aggrieved party actually appeared and participated at such hearing before the Administrator issued a decision establishing and affecting the rights of the parties. The decision of the Board in our case ordering the conduct of an election, and the actual conducting of an election, was no mere act of an advisory committee. It was an official decision of the Board, which the Board was empowered to make only after service of notice to all affected parties, apprising them of the contents of the petition and the holding of a hearing. Whether an election be held at all or not, or whether it was barred by our contract, who should participate therein and who should be excluded therefrom—these and many others were all issues determinable only after notice or hearing.

It is no answer to say that the Board is free to determine these vital issues without notice or hearing, and then months after grant us a hearing *ex post facto*, after the prejudice occurred and the harm is done. An *ex post facto*

hearing is not judicial. It is not what the statute commands. It is not an "appropriate hearing." It is not due process nor does anything in the *Opp* case intimate so. The Board's position would have a certain degree of persuasiveness entirely lacking here had it in fairness, in accordance with judicial procedure, first vacated its order and decision of election, something which it steadfastly, however, has refused to do. Clinging, therefore, at all times to its decision and order requiring an election, without granting us notice or hearing, it is nothing more than an empty formality of going through idle motions to extend to us an *ex post facto* hearing.

In the *Opp* case, it will be noted that before the Administrator acted he gave full notice and granted a complete and formal hearing. In our case the Board decided first to hold an election without notice or hearing, and then belatedly sought to grant us a *nunc pro tunc* substitute therefor. *But there is no substitute for due process.*

American Surety Co. v. *Baldwin*, 287 U. S. 156, upheld the validity of a statute of Idaho permitting a trial court to enter judgment against the surety company where the merits of any defense which the surety company might have thereto were, according to statute available to the company by procedure within the state courts, but where the company lost its right to pursue such procedure by failing to act within the statutory time. It is enough again to point to the fact that we have no statutory remedy to review the failure of the Board to accord us notice and hearing.

The Moore Ice Cream Co. v. *Ross*, 289 U. S. 373, the facts have no relevancy whatsoever to ours. The case merely held that a tax paid without protest under the law of 1917 could be collected back under the law of 1924 dispensing with protest, where no protest prior thereto had been made.

These cases involve an attack upon the constitutionality of various state statutes. We do not for a moment question the validity of the National Labor Relations Act. We merely attack the Board for refusal to follow the statute. We address ourselves to the single question of whether or not the Board, under an act admittedly valid, has the power to violate that Act, to refuse us notice and hearing commanded by statute and yet to claim the protection of judicial immunity. Again, can the Board offer us a substitute for the notice and hearing commanded by Congress, for the notice and hearing specifically prescribed by its own rules and regulations—and tell us that we must accept that substitute in lieu of the due process vouchsafed us both by Congress and by the Constitution itself? Can it decide first and then tell us that we must be satisfied with an *ex post facto* hearing after it had already acted upon its decision? Is that due process? We think not. Nor does the *Switchmen's* case in any wise deny the Courts, under the constitution, the right to inquire into the adequacy or inadequacy of hearing procedure, to conform to due process. It protects the Board when pursuing its authority, but does not license it to violate the very law under which it operates.

Constitutional law has evolved to a substantial and a very measurable degree since 1884 when this court, through Justice Matthews, in *Hurtado* v. *California*, 110 U. S. 516, enunciated memorable principles in which the criteria of due process were defined. There is nothing obsolete or archaic about those pronouncements. They resound with as much truth and eloquence today as when they were announced. The court declared:

> "Law is something more than mere will asserted as an act of power. It must not be a special rule for a particular person or a particular case, but, in the language of Mr. Webster in his familiar definition, 'The

general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial * * *.'"

Respectfully submitted,

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